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No. 5706

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY (a corporation),

Appellant,

vs.

N. H. NEPSTAD,

Appellee.

BRIEF FOR APPELLANT.

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STATEMENT OF THE CASE.

This action is one to recover damage for alleged fraud and deceit in the sale to appellee of forty acres of land near Sacramento City in what is known as the Rio Linda district. Action was begun February 29, 1928, and the complaint alleges, in substance, as follows:

That prior to the purchase of these lands, appellee resided in North Dakota, was unfamiliar with California farm and fruit lands, and entirely relied upon statements and representations of appellant in respect thereto; that appellant fraudulently stated concerning these lands that all of the tracts of land in the County of Sacramento, California, were of the fair and reasonable market value of three hundred fifty ($350.00) dollars per acre and upwards; that the soil thereof

was rich and fertile, capable of producing all sorts of farm crops and products, entirely free from all conditions or things injurious or harmful to the growth of fruit trees, perfectly adapted to the raising of deciduous fruits of all kinds in commercial quantities, producing large crops thereof of the finest quality; that appellee came to California prior to his purchase for the purpose of inspecting the land, was shown casually over it by appellant, and while here was shown adjoining districts, it being stated to him that the Rio Linda lands compared favorably with those of the adjoining districts, and was adapted to the same uses; that on March 24, 1922, appellee contracted to purchase four contiguous lots of ten acres each, and on September 12, 1922, made an amended contract of purchase, excluding two of the lots first covered, and including two others, to make up the full forty acres; that the representations as to quality and value were false; that the land was not worth over fifty ($50.00) dollars per acre, one-seventh of what he had paid therefor, and was totally unfitted to fruit culture, being underlaid with hardpan and clay. Damages in the sum of seventeen thousand ($17,000.00) dollars was asked.

The complaint was demurred to, the demurrer, among other things, presenting the question of the statute of limitations. Thereupon the complaint was amended. By this amendment appellee sought to allege facts bringing himself within the statute of limitations, and touching upon his discovery of the alleged fraud. Therein he says he came to California in July of 1922, and resided in the City of Sacra-

mento, which is about ten miles from the property he had purchased; that he has never lived upon the land; that the adjoining lands were sold to persons residing in portions of the United States outside of California, unfamiliar, as was appellee, with the value of California lands and the adaptability thereof to fruit culture, and that it was generally believed in the locality of the land up to February, 1927, that the statements made appellee in respect of these lands were true; that appellee never had the land appraised, nor offered it for sale, and did not hear from anyone that it was not worth three hundred fifty ($350.00) dollars per acre, or not rich and fertile fruit land; that in 1927 purchasers of adjoining lands complained before the Real Estate Commissioner of the State of California that they had been defrauded in the sale of their lands to them, but that appellee made no particular inquiry concerning the matter; that the complaints were dismissed, and appellant then stated to appellee that his land was worth the amount he had paid for it, and was good fruit land; that appellee's actual discovery was brought about by a further discussion of the facts concerning said land with other settlers in said locality who had been so defrauded.

The complaint of appellee appears on pages 1 to 7 of the transcript, the amendment thereto on pages 9 to 11, and on pages 12 and 13 appears the demurrer of appellant interposed to the complaint as amended, wherein again appellant interposed the plea of the statute of limitations to the pleading. The demurrer was overruled, the cause tried to a jury, and a verdict rendered in the sum of seven thousand ($7000.00) dollars.

The appeal presents the following questions: Error in the overruling of the demurrer; in the denial of a motion for directed verdict made at the close of the case; in the charge of the Court; and in the refusal of instructions requested by appellant.

SPECIFICATION OF ERRORS RELIED ON.

I.

The Court erred in overruling appellant's demurrer to the complaint filed in the above entitled cause.

(See Assignment of Errors, page 25 of Transcript, Assignment No. I.)

II.

The Court erred in denying appellant's motion for a directed verdict.

(See Assignment of Erros, page 27 of Transcript, Assignment No. VI.)

III.

The Court erred in instructing the jury on the question of appellee's belief in the alleged representations, and his reliance thereon.

(See Assignment of Errors, pages 33 to 38 of Transcript, Assignment No. XIII.)

IV.

The Court erred in instructing the jury on the question of the date of the alleged discovery of the falsity of the representations.

(See Assignment of Errors, pages 38 to 41 of Transcript, Assignment No. XIV.)

V.

The Court erred in instructing the jury as to the definition of a "commercial orchard."

(See Assignment of Errors, pages 41 to 42 of Transcript, Assignment No. XV.)

VI.

The Court erred in refusing to instruct the jury on the statute of limitations, as requested in appellant's proposed instruction No. 1.

(See Assignment of Errors, pages 42 to 44 of Transcript, Assignment No. XVI.)

VII.

The Court erred in refusing to instruct the jury on the effect of discovery by appellee of the falsity of the alleged representations.

(See Assignment of Errors, pages 44 to 45 of Transcript, Assignment No. XVII.)

VIII.

The Court erred in refusing to give appellant's proposed instruction No. 4, concerning the difference between representations of fact and matters of opinion.

(See Assignment of Errors, page 45 of Transcript, Assignment No. XVIII.)

IX.

The Court erred in refusing to instruct the jury concerning the effect of appellee's having been able by reasonable diligence to discover the alleged falsity of the representations as to value.

(See Assignment of Errors, page 45 of Transcript, Assignment No. XIX.)

ARGUMENT.

I.

THE COURT ERRED IN OVERRULING APPELLANT'S DEMURRER TO THE COMPLAINT FILED IN THE ABOVE ENTITLED ACTION.

We have hereinbefore referred to the portions of the record wherein appear the complaint and the amendments thereto, and the demurrer interposed by appellant. The demurrer was both general, and, in addition, set up the statute of limitations. This statute of limitations is found in the California Code of Civil Procedure, being Subdivision 4 of Section 338 thereof, and reading as follows:

> "The periods prescribed for the commencement of actions other than for the recovery of real property are as follows:
>
> *Within three years:*
>
> An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

In the case of *Sacramento Suburban Fruit Lands Company v. Melin,* No. 5671, pending on appeal in this Court, is a full discussion of the rules of law applicable to cases of fraud brought more than three years after the accrual of the cause of action, together with a full citation of authorities upon which appellant relies herein. For the sake of brevity we will not repeat the arguments and authorities advanced therein and quoted, but will state the propositions therein advanced briefly, in support of our claim herein that the Court erred in overruling appellant's demurrer.

This distinction, however, between the *Melin* case and this case should be noted, to wit, that by an amendment to his complaint the appellee sought to meet the objection herein urged, which effort was not made in the *Melin* case. We submit, however, as we shall hereinafter try to show, that the attempt made by appellee in this regard was abortive, and that in effect his amendment added nothing to the statement of his cause of action in answer to the objection that his action was barred by limitation. Probably the best known statement of the rule in pleading such matters appears in *Lady Washington Consolidated Company v. Wood,* reported in 113 Cal. 486. Summarizing from the statements there, but practically quoting them, we find the following:

The right of a plaintiff to invoke the aid of a Court for relief against fraud after the expiration of three years from the time the fraud was committed is an exception from the general statute on that subject, and cannot be asserted unless the plaintiff brings himself within the terms of the exception. It must appear that he did not discover the facts constituting the fraud until within three years prior to commencing the action. *This is an element of the plaintiff's right of action and must be affirmatively pleaded by him in order to authorize the Court to entertain his complaint.* "Discovery" and "knowledge" are not convertible terms and whether there has been a discovery of the facts constituting the fraud, within the meaning of the statute of limitations, is a question of law to be determined by the Court from the facts stated. It is not sufficient to make a mere averment

thereof, but the facts from which the conclusion follows must themselves be pleaded. It is not enough that the plaintiff avers that he was ignorant of the facts at the time of their occurrence, and has not been informed of them until within the three years. He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them, as that they were done in secret or were kept concealed; and he must show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the Court may determine whether the discovery of these facts was within the time alleged: and, as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, he will be deemed to have had actual knowledge of these facts.

Testing the original complaint filed herein we find that no attempt was made by the appellee to bring himself within the rules of pleading above stated.

Referring again to the *Lady Washington* case above cited, we quote the following from the opinion therein as particularly applicable to the situation presented in the case at bar:

> "Testing the complaint herein by these rules, it falls far short of showing that the plaintiff is within the exception to the statute, or that its cause of action is not within the apparent bar of the statute. * * * It was necessaary for the plaintiff to allege not only the facts constituting this fraud, but also the facts connected with its

> discovery, so that it might appear from the complaint that the action was not barred by the statute of limitations. The only averment by the plaintiff in this respect is that 'it was not informed of and did not know or discover any of the aforesaid frauds, or the facts connected therewith until within six months preceding the filing of the complaint herein.' It is not averred that any of these facts, or of the transactions set forth as constituting the fraud, were done secretly, or were concealed from the plaintiff, or that any information which it sought was refused, or that, indeed, it sought to obtain any information upon the subject."

To this original complaint a demurrer was interposed which was sustained by the Court below and thereupon appellee amended his complaint as hereinbefore noted. We submit that when the amendment is tested by the same rules, it fails as signally to meet the objection as did the original pleading.

We have hereinbefore analyzed the amendment. The averment that the surrounding lands had been sold to persons resident at points distant from California, and that it was believed generally in the locality of the lands up to February, 1927, that they were fruit lands of the value of three hundred fifty ($350.00) dollars per acre and upwards, adds nothing to the pleading. This is so for the reason that it is not alleged that this appellee ever inquired concerning the value of the lands or their adaptability for fruit culture, even from his neighbors, but it does affirmatively appear that appellee "did not hear from anyone that it was not of said value and was not rich and fertile fruit land prior to the spring of 1927," a period well within the statute of limitations.

It is not alleged, as it could not be alleged, that appellee remained distant from the land he had bought and that he therefore had no opportunity of making a full investigation concerning the truth or falsity of the representations upon which he claimed to have implicitly relied in the purchasing thereof.

This pleading does not attempt to meet the requirement that it must set out the reasons why discovery was not made sooner. It amounts to nothing more than a statement that it was not made. The purpose of pleading the facts constituting the discovery is to enable the Court to see whether or not the facts discovered and the nature of discovery could be said to make a showing of due diligence therein. The significant thing about this pleading is that it amounts to a confession that appellee never made the slightest inquiry concerning the truth or falsity of the representations he had relied upon, although present and living in the community wherein his property so purchased was situated, and having open to him every avenue of information possible in the premises. If the allegations in the pleading be true, this land was totally unfitted for the special purpose for which he claims to have bought it, and was of a value amounting to only one-seventh of the price he paid.

These things were discoverable by the most simple inquiries. If there was any duty of investigation whatever resting upon the appellee it cannot be argued that the exercise of that diligence would not have immediately led to all the information it was possible to obtain upon the matter. That there was such duty resting upon appellee is well decided and is a reasonable requirement.

His pleading discloses that he made a trip to California for the especial purpose of investigating the quality and value of the property he was considering buying. If, as he says, he was unfamiliar with the matters he set out to investigate, it was his duty to make inquiry, provided that ample opportunity was available therefor. The pleading confesses that such was the fact. There is no pleading that confidential relations existed between the parties or that appellee was aged, infirm or incompetent. He therefore shows himself to have been a person possessed of the ordinary prudence, and one who had set about investigating the adaptability of a tract of land for a special use, that is, fruit culture, and, more significant still, for the purpose of investigating the market value thereof. This value he says had theretofore been represented to him to be three hundred fifty ($350.00) dollars per acre, and he states it was a fact at the time he made his investigation that this representation was false, that the land was worth but fifty ($50.00) dollars an acre, and that he came out here to California for the purpose of discovering whether or not it was false.

A man who journeys two thousand miles to investigate the quality and value of a forty-acre tract of land is in a position wherein a pleading of due diligence must necessarily require something more than a continued reliance upon the statements of the adverse party in the transaction. What was the purpose or value of an inspection trip of that extent if he was to take and implicitly rely upon and not test the truth of statements already made to him before

he started upon his journey of inspection? He could have done that just as well back in North Dakota. It is true he attempts to evade the natural conclusion to be drawn from his allegation of an inspection trip by stating that when he arrived here the appellant's agents showed him over the lands casually, and repeated the representations theretofore made, but he cannot escape this proposition—that the very material representation as to value upon which he relied, the falsity of which would measure his loss, since the represented value was the price he was paying, was a matter incapable of concealment and easily investigated. It remained incapable of concealment, and easy to investigate, during all the years he resided in close proximity to the property he had bought.

He came to California in July of 1922, residing in close proximity to his property, and remained there until the fall, when he returned to Canada on business, returning to California in the winter of 1922. He remained there until the fall of 1923, when he was absent from the community for a period, and then has lived there ever since. He does not allege that the made any inquiry whatever, and only goes so far as to say that he did not hear from anyone that the representations made to him were false. Since it is not supposed that anyone but himself was acquainted with what representations were made to him, it is not likely that an ordinarily prudent person charged with the duty of investigating would hear from these ignorant of the subject of the investigation anything about it.

The discrepancy between the represented value and the alleged value, that is, between $350.00 per acre and $50.00 per acre, or, by totals, the difference between $14,000.00 and $2000.00, is, to say the least, a startling difference. We submit his pleading was utterly insufficient to meet the tests above referred to, to inform the Court why his discovery was not made sooner. Lack of inquiry, lack of all effort when inquiry was easy and little effort was required, is not a showing of any *reason* why his discovery was not made sooner. The information was open to him, lay before his eyes. His natural interest in his property is apparent. He alleges he had bought the land as an investment. Men so buying property naturally speculate concerning whether their investment is to be profitable or not. His pleading shows every reason why a normal and prudent man would make some slight inquiry, and shows no reason whatsoever why he would not. To inquire was to discover.

It is never enough to assert simply that the discovery was not sooner made.

> "It must appear that it could not have been made by the exercise of reasonable diligence and all that reasonable diligence would have disclosed, plaintiff is presumed to have known, means of knowledge in such case being the equivalent of the knowledge which it would have produced."
>
> *Montgomery v. Peterson*, 27 Cal. App. 675;
>
> *Ruhl v. Mott*, 120 Cal. 668;
>
> *Bacon v. Soule,* 119 Cal. App. 427.

As stated in *Johnston v. Kitchin,* 265 Pac. 941, by the California Supreme Court, no secret "could be suppressed that would or could affect the value of a

commercial city lot, the title to which is a public record and its value an open matter of investigation to the entire public. We know of none, and think in a practical sense, none can exist."

These remarks are equally and particularly applicable to the situation presented by the pleading of appellee.

> "If the party affected by any fraudulent transaction or management might with ordinary care and attention have seasonably *detected* it, he seasonably had actual knowledge of it."
>
> *Angell on Limitations,* Section 187.

The meaning of the terms "diligence," "investigation," "detection," when used as descriptive of the obligation resting upon one who claims to have been defrauded to detect the presence of fraud, does not mean slumbering until a stranger awakens the slumberer and informs him, *ex industria,* of the fraud.

No doubt appellee pleaded as strongly as he could, but he did not meet the test, as, of course, he could not meet it, for it is utterly impossible for an owner having purchased property for investment purposes and expecting to make a profit therefrom, and therefore presumptively knowing the value thereof, to reside in close proximity thereto for three years and then show by a pleading why he did not during that period discover that there was a value of only one-seventh the amount he had paid therefor. We submit the demurrer should have been sustained.

II.

THE COURT ERRED IN OVERRULING THE MOTION FOR A DIRECTED VERDICT.

All that has been said heretofore on the matter of the sufficiency of appellee's pleading to show his action was not barred by the statute of limitations is applicable here. However, the situation is strengthened by a consideration of the testimony which appellee introduced in support of his allegations as to non-discovery. His testimony appears on pages 47 to 67 of the transcript, and the following constitutes his showing in respect of this point now under discussion.

He made a trip to California in May of 1922, before his purchase. (Transcript, page 49.) He made no investigation except with the agent of appellant. (Transcript, page 49.) He came back to California to live in July of 1922. At that time he asked that two lots his contract covered be exchanged for two others, which was done. (Transcript, page 50.) He was away from Sacramento in the fall of 1922 for about three months. He went to the lands and looked them over once in a while, perhaps half a dozen times. He saw trees growing in the neighborhood of his lands which did not appear to be doing their very best. "I did not find out the land I had bought was not adapted to tree raising before 1928." "About February, 1928, I heard that the land was not worth $350 an acre * * * before that time I had never heard it was not worth that price, and I had never heard before that it was not fruit land. I had never talked with any of the neighbors out there about it." (Transcript, page

51.) "I own farms in Canada, maybe a thousand acres. * * * I did not have any other business except farming. * * * I bought land for myself sometimes, and sold it again." (Transcript, page 52.) "I spent about four days all told in Sacramento on my first visit. * * * I did not communicate with any citizens of Sacramento during that week about your land in Rio Linda. I did not call at the office of any real estate dealer in Sacramento during that time. When we went out on the land we looked at it. I did not examine the soil." (Transcript, page 55.)

After he had moved to Sacramento it appears that appellee considered that he knew enough about the land the appellant was selling to justify him in likewise engaging in the sale thereof. He wrote from Sacramento, under date of August the 8th, that he was going to go to Canada, where he formerly lived, about the 15th of that month, and that if he found his neighbors there had "more money than they can handle I will try and sell them some of your California lands if there is any commission in it for me, and if I can hang a few on the fence you might come and help me close the deals." (Transcript, page 61.) In April, 1923, he claimed commissions for sales he had made, writing to appellant that he "was to have commission for the land sold to Torger Olsen, T. J. Cummins and R. E. Mackersee, all of Minot. Maybe you have overlooked this, but I have a letter to show from the company that they promised me five per cent of all the sales I could hang on the fence at Minot, and I sure did put those parties on the fence, and worked hard for it, and I can prove it by the parties that I

did, so please send me a statement. * * * " (Transcript, page 62.)

As indicating his attitude of mind toward those engaged in the nefarious practice of selling land, he wrote the appellant on May 29, 1922, after he had returned from his inspection trip that he was engaged in making sales of this land for the appellant, had "certainly hustled up that deal and should get my commissions for same"; that he could "make quite a few land sales there because people have got pretty good confidence in me if I am a real estate and grain buyer. You know that as a rule that this class of people has got pretty bad characters." (Transcript, page 57.)

Appellee further testified (Transcript, page 64):

> "From the time I moved my family to Sacramento, it was the 7th of February, 1928, before I made any personal inspection of the soil on this land. During the time I lived there from 1922 I went out there a few times. * * * I did not find any commercial orchards in the neighborhood of may land during none of that time. * * * I did not see them actually planting trees, nor blasting holes for planting trees. I did not see the digging of wells or well pits on any of the lands in the neighborhood of my land. I did not examine the soil on any of the lands near mine during that time. I did not inquire of any of the neighbors during all of these years about the soil. I did not inquire of any of the neighbors or the people in Sacramento as to whether or not fruit could be grown on this land. *I made no inquiry whatsoever.* During all that time up until February, 1928, I believed that fruit could be grown on that land which I bought, and believed during all of this time up to February, 1928, that fruit of all kinds could be grown generally in the vicinity

of my land. No one had ever told me to the contrary, and I had no notice that fruit would not grow." (Transcript, page 65.)

As indicative of how truthful the appellee was in the foregoing sweeping statements, he wrote on March 4, 1924, to the appellant, stating: "My boys are afraid of the chicken business. They cannot see any money in it, and they won't go out there and they say they cannot raise fruit to any success. Our neighbor put in twenty acres of grapes and they died out." (Transcript, page 65.)

Summing up the testimony of appellee upon this most important matter, it amounts simply to this, that although living in close proximity to the property, he had purchased during the period from July, 1922, up to three years prior to the commencement of his action on February 29, 1928—though he had alleged he bought the land for an investment, though actively engaged in selling adjoining lands to his former neighbors and claiming commissions therefor, though thus interested in the quality of the soil and the value thereof during all that period, though a dealer in real estate himself and accustomed to the purchase and sale of lands on his own account, he yet contents himself with a bald declaration that he never made any inquiry of anybody about the value or about the quality of the soil, and remained in total ignorance of both matters until six years after his purchase. He began dealing in these lands, selling them to his neighbors, in 1922. Of course it was necessary for him to discuss price and the quality. If it be true, as he contends and as the jury found, that

the representations made to him about value and quality were false, he knew they were false. It is preposterous to come to any other conclusion.

Directing the Court's attention again to the authorities hereinbefore referred to concerning his situation in respect of the statute of limitations, wherein it is set forth that, having relied upon these representations and thereafter having come promptly into full opportunity for testing their truth, and having in this case the additional duty to investigate these things if he was to deal in these lands as an agent of appellant, the conclusion becomes irresistible either that he falsified when he said he did not know anything about it, or that he failed utterly to show that he used any diligence whatsoever to discover. A clearer case of bar by the statute of limitations from the evidence introduced could not be made out. We submit the Court erred in refusing to direct a verdict in favor of appellant upon that ground.

III.

THE COURT ERRED IN INSTRUCTING THE JURY ON THE QUESTION OF APPELLEE'S BELIEF IN THE ALLEGED REPRESENTATIONS AND HIS RELIANCE THEREON.

The instructions of the Court upon this matter are found on pages 33 to 38 of the transcript. In the consideration of this specification, it is well to bear in mind the following: Appellee was a farmer and a dealer in farm lands. (Transcript, page 52.) He believed as to dealers in real estate that "this class of

people has got pretty bad characters," although he says that his neighbors had "pretty good confidence in me, if I am a real estate and grain buyer." (Transcript, page 57, letter of May 29, 1922.) He came to California for the purpose of making an investigation concerning the property he was buying, and stayed there in the vicinity of the land for nearly a week before returning and signing his contract. Under these circumstances the fair presumption is that he did not rely upon what was told him, but, on the contrary, formed his own opinion by special investigation undertaken for that purpose, both as to the quality and as to the value of the land.

> "Upon the question of value, the purchaser must rely upon his own judgment and it is his folly to rely upon representations of the vendor in that respect." *Ellis v. Andrews,* 56 N. Y. 83.
>
> "Positive statements as to value are generally mere expressions of opinion." *Kimber v. Young,* 137 Fed. 744. (70 C. C. A. 178.)
>
> "The law recognizes the fact that a man will naturally overstate the value and qualities of the articles which they have to sell. All men know this and a buyer has no right to rely upon such statements." (Same.)
>
> "If a purchaser of real estate visits the property prior to the sale and makes a personal examination of it touching representations made as to its quality, character or condition, he will be *presumed* to rely not upon the representations, but upon his own judgment in making the purchase, provided the vendor does nothing to prevent his investigation being as full as he chooses." *Everist v. Drake,* 143 Pac. 814. (*Southern Development Co. v. Silva,* 125 U. S. 257; *Farrar v. Churchill,* 135 U. S. 609; *Wainscott v. Occidental etc. Assn.,* 98 Cal. 253.)

In respect of this question of reliance, the Court told the jury:

> "Did the plaintiff believe those representations? Did they influence him in whole or in part? Did he rely upon them in whole or in part, and was thereby induced to buy the land which otherwise he would not have bought? What is the situation in respect to that? Plaintiff was a Minnesotoan, if I remember right. He fell in with Amblad down in North Dakota and discussed this land. First he had the book. He never had been to California. I am taking his statement for it. He says he did not know anything about California lands, fruit lands or what they were adapted to or the manner of raising California fruits, commercially or otherwise. He says he did believe Amblad, and he believed the book. Ask yourselves why he shouldn't. Why shouldn't he believe and act upon them? He entered into a contract after they had been made to him and turned over some property right in the beginning to the defendant. * * * He made an offer to buy the land, provided the defendant would accept the offer. * * * I do not remember when it was accepted, but so far as plaintiff knew it was not accepted until after he had been out in this country." (Transcript, page 34.)

In what, we respectfully submit, seems to be an effort to minimize the legal effect of appellee's inspection trip, the Court said:

> "After the plaintiff discussed the matter with Amblad and read the book, he said he came to California to look at the land. He talked to Amblad and listened to his reports with respect to the property and when he came to Sacramento he found Amblad right at the depot. Amblad took him along. Was that for the purpose of making sure of him, and seeing to it that he did not fall into the hands of somebody else? Ask yourselves

that question. Amblad took him around for four days. Plaintiff says they were on this land only once. He did not see anything wrong with it. They made a casual inspection. Amblad says they just walked over it and made a surface inspection. * * * For what purpose would a real estate man take a prospect out to other sections to show him growing orchards? The plaintiff says Amblad told him his land would be like that when it was planted sufficiently along with fruit for commercial purposes.

There is a rule of law, Gentlemen, which is this: If the party does not rely on the representations made to him, but relies upon what he sees, sees upon the land, and if he discovers the truth in his inspection, then, of course, he cannot say that he relied upon representations, but you must remember that plaintiff was dealing with experts, and that he was not an expert in California lands and fruit lands. * * * Having inspected the land thus far, a surface inspection; to see the layout, as Amblad said, and plaintiff said—plaintiff says he was there once and Amblad says several times—the plaintiff went East. Then he wrote to the defendant 'Let the bargain go through. I found more than I expected.' What does that indicate to you? What would a reasonable person infer? That he found out that the land was not worth $350 an acre? That he found out that it was not adapted to commercial orcharding? If he had found out those things would he have likely went on with the bargain and paid $14,000 for those acres? You may see in those letters the extent of plaintiff's inspection, and whether he did discover anything to show him that those representations were false. The bargain was made. He did buy. * * * After that he served as an agent to some extent under Amblad, and was offering the lands. He is entitled to the same presumption that anyone is, that he intended to act fairly and honestly with his prospective customers." (Transcript, page 37.)

Now it is especially significant, we submit, that the Court found it advisable to make so many observations tending to convince the jury that in spite of the very obvious results that would ordinarily flow from an experienced buyer's personal inspection upon the ground and in the community, touching quality of the soil, and, particularly, value thereof, that appellee was entitled to a finding at the hands of the jury that he did rely upon the representations made to him. The Court takes care to observe that Amblad met appellee at the railroad station and showed him over the land, but fails to observe that appellee, out here for the purpose of making an inspection, was a free man, entitled to go where he chose, and ask whom he pleased, not handcuffed to the agent of appellant. Why did not the Court suggest the probability that if, when he arrived here he met the same agent who had lied to him before, he would as an experienced "real estate buyer," believing that other real estate men were pretty "bad characters" and if, as the Court suggested, the probabilities were that he was being waylaid to prevent him from making independent inquiry, that appellee would have said, "Such extraordinary exertions point to something concealed, and I will make independent inquiry." The jury did not have to take this man's preposterous statements, that, having come two thousand miles to investigate this land, he asked questions of nobody except the agent of appellant, whose statements concerning it he has theretofore had. No, the Court, we submit, went to considerable lengths to submerge these considerations, and to advance, on the contrary, the best argument

possible as to why the jury would be justified in holding that the appellee had relied upon the representations made. The giving of this instruction was duly excepted to. (Transcript, page 170.) We submit it was extremely unfair, argumentative and exceeding all proper bounds of comment on the testimony. Its giving was error.

IV.

THE COURT ERRED IN INSTRUCTING THE JURY ON THE QUESTION OF THE DATE OF THE ALLEGED DISCOVERY OF THE FALSITY OF REPRESENTATIONS.

The instruction of the Court upon this matter is found on pages 38 to 41 of the transcript. We submit that the instruction is contrary to law in that it failed to properly tell the jury what was required of appellee in establishing, as he was bound to do, that he had used due diligence to detect the fraud after moving within the vicinity of the property he had bought, and that he was unable thereby to do so.

The Court, throughout this charge, treats this matter as one wherein nothing in the way of diligence was required of this man, and, in effect, charges him only with the duty of diligence after he had actually discovered fraud or facts sufficiently strong to give him notice thereof. Thus the Court says:

> "The law is that a person who has been defrauded, as plaintiff alleges that he was in this case, must bring his suit within three years after he discovers the fact. Of course, if he is defrauded he is deceived, he is in ignoraance. The law says the moment that that ignorance is dispelled and you discover you have been deceived,

you must bring your suit within three years thereof, or you cannot sue at all." (Transcript, page 38.)

Nothing herein is said of his duty to investigate after ample opportunity is given to do so. Nothing is said concerning his showing of why a discovery was not in fact made sooner. Nothing is said about the distinction between knowledge and discovery. Again the Court said:

> "If he found out before March 1, 1925, that these representations or either of them (quality and value) was false, if he found it out before March 1st, 1925, he brought his suit too late. * * * So, if he found the fact out before March 1st, 1925, he brought his suit too late." (Transcript, pages 38 and 39.)

Here again the Court charges appellee only with a duty to act after knowledge of fraud has been gained by him. From that point on the instruction is concerned wholly with excusing his failure to discover, and with argument from the facts that he did not discover, and should not be held to have been barred. Thus the Court says:

> "The inference is that he rested confidently on the representations that had been made to him. * * * He says he heard nothing about the land. No one told him it was not worth so much money, no one told him it was not adapted to commercial orcharding, and he did not know." (Transcript, page 39.)

> "Would it have disclosed to him that the land was not adapted to commercial orcharding, or that the land was not worth $350 an acre? He is not bound to accept casual observations as true, even if he heard of it. He says he did not." (Transcript, page 40.)

We will not quote the entire instruction. We submit it is argumentative in the extreme, does not state the law, and surpasses the legitimate bounds of comment upon testimony.

The exception to this instruction appears at page 170 of the transcript.

V.

THE COURT ERRED IN INSTRUCTING THE JURY AS TO THE DEFINITION OF A "COMMERCIAL ORCHARD."

The instruction upon this matter appears on pages 41 and 42 of the transcript. It was duly excepted to. (Transcript, page 170.)

The portion of the instruction objected to is that requiring that a crop be returned before an orchard can be considered a commercial orchard. We submit that market prices have nothing whatsoever to do with the matter of a commercial orchard, insofar as is concerned the adaptability of land for that use. The land has nothing to do with markets. The representations complained of and alleged to have been made were not representations that a money profit could be made, but were concerned solely with the amount of fruit that could be grown, and the quality thereof. This instruction was given to the jury seven years after the sale was made, and at a time when, as is well known, the orchard industry in this state has been the victim of heavy losses. The Court emphasized this matter of profit. It said:

"Eventually when it does begin to bear it must not only liquidate that expense, but also for the series of years, it must show a profit * * *"
(Transcript, page 42.)

VI.

THE COURT ERRED IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 1.

Appellant requested an instruction upon the matter of the Statute of Limitations. This requested instruction appears on pages 42, 43 and 44 of the Transcript. It was presented and designed for the purpose of pointing out what the Court had, as we have heretofore said, so signally failed to point out to the jury, to wit, that the duty rested upon appellee after he began living in the vicinity of the land he had bought, to exercise ordinary diligence to discover whether or not the representation in respect thereof upon which he was still relying was in fact true. The Court had told the jury, as we have heretofore quoted, that the inference was he was, during all this time, relying upon these representations. If this were true he must have known it. He must have been conscious of it. Under the circumstances, since particularly on the matter of value, information was readily accessible, certainly as readily accessible then as it has ever been, it was important to have the jury informed that he did owe a positive duty of exercising reasonable diligence to detect, discover, test out the truth of these representations upon which he was relying. The instruction requested was designed to serve that need

of the jury, if it was to fairly pass upon the issues in this case. Not only in this case, but in all of its companion cases wherein the Statute of Limitations was an issue, the Court was requested over and over again to inform the jury concerning this duty of investigation, and it steadily refused to do so; on the contrary, concerning itself mainly with commenting upon the testimony in such a way as to persuade the jury of the entire reasonableness of a finding on their part that the causes of action were not barred.

This issue was clean-cut throughout the cases. Steadily the Court has refused, as it refused in this case, to say anything about the matter of diligence in detecting fraud, or the duty resting upon the plaintiff to exercise it. We submit the refusal to give the instruction was error.

VII.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY CONCERNING THE EFFECT OF THE DISCOVERY BY APPELLEE OF THE FALSITY OF THE ALLEGED REPRESENTATIONS.

The appellant requested the Court to instruct the jury as follows:

> "You are further instructed upon the matter of the plaintiff's discovery of the alleged fraud that if plaintiff discovered that a material representation concerning the land he bought was false, then he was at once by that discovery presumed to have knowledge of the truth or falsity of the remaining representations, and must bring his action within three years of the discovery of the falsity of any material representation concerning the land."

We submit that in this case the foregoing instruction should have been given. This appellee was an experienced dealer in real estate, and was actively engaged shortly after buying his property here in selling it to others. Notwithstanding the possibility that he may have been doing so in reliance upon his belief in the truth of the statements made to him in its purchase, there was certainly open to this jury under the foregoing evidence the right to believe and to conclude that he in fact did know what he was thus presumptively held to have known, that is, the true value of his property, and so believing, it would have been proper for the jury to apply the rules stated in the instruction that if he did know that the representations in respect of value were false, then he was presumed to have knowledge of the truth or falsity of the representations touching quality of his land. The matter was entirely omitted from the charge of the Court, and the refusal to give the requested instruction was error.

The exception thereto was duly made by appellant. (Transcript, page 171.)

VIII.

THE COURT ERRED IN REFUSING TO GIVE APPELLANT'S PROPOSED INSTRUCTION NO. 4, CONCERNING THE DIFFERENCE BETWEEN REPRESENTATIONS OF FACT AND MATTERS OF OPINION.

The Court was requested by appellant to instruct the jury as follows:

> "You are instructed that a representation which merely amounts to a statement of opinion,

judgment, probability or expectation, or is vague and indefinite in its terms, or is merely a loose, conjectural or exaggerated statement, cannot be made the basis of an action for deceit, although it may not be true, for a party is not justified in placing reliance upon such statement or representation." (Transcript, page 45.)

Under the circumstances of this case, we submit the foregoing instruction should have been given. This man had made an inspection of the lands, and, particularly with regard to the representation of value, there was nothing concealed or that could have been concealed concerning its truth or falsity. He was in the very place where he could have obtained information about it, and since he came here for that purpose, in spite of his testimony that he did not inquire, it was a fair inference from the fact of his having come here, that his testimony upon that point was false. It is rare that statements of value are, legally speaking, representations of fact. As we have heretofore shown, by authorities quoted from, it is only where one person possesses superior opportunity for investigation and knowledge that such a statement can ever amount to more than a statement of an opinion. The rule that such statements are matters of opinion was fairly applicable here, and the Court did not touch upon the matter in its instructions.

IX.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY CONCERNING THE EFFECT OF APPELLEE'S HAVING BEEN ABLE BY REASONABLE DILIGENCE TO DISCOVER THE ALLEGED FALSITY OF THE REPRESENTATIONS AS TO VALUE, AS REQUESTED IN APPELLANT'S PROPOSED INSTRUCTION NO. 5.

The Court was requested to instruct the jury as follows:

> "You are instructed that if the plaintiff discovered, or by the exercise of reasonable diligence could have discovered, the falsity of representations as to value of the land he bought more than three years before he commenced his action, then your verdict must be for the defendant." (Transcript, page 46.)

Appellant was clearly entitled to the giving of this instruction. As we have heretofore said, it is incomprehensible that under the circumstances this matter of value should not have been inquired of by appellee during the years extending between the date of his purchase and a date three years before the beginning of his suit. During all that period the information was readily available.

Furthermore, appellee was dealing in these lands. The conclusion is well-nigh irresistible that he did then discover all that he has ever known about their value. Certainly reasonable diligence, even the slightest inquiry, would have disclosed these matters to him, and if he knew the falsity of that representation he knew the falsity of the most important statement made to him, for the measure of the falsity of that statement was the measure of his damage.

His own expert on value, Mr. Kerr, testified that even had his land been fruit land, it would only have been worth $125 to $150 an acre (Transcript, page 73), whereas, according to the same witnesses' testimony and the allegations of appellee's pleadings, the actual value differed from the represented value and the price paid by a much greater margin.

If, then, the jury concluded that he did discover this matter of value misrepresentation, they should have been told its effect upon his cause of action, and the consequent duty upon him to make prompt and thorough investigation as to the remaining representations. Little attention was paid to this value representation by the Court in its charge, much emphasis placed upon the representations as to quality of soil, and, particularly the assumed difficulty attending its discovery. But here was something which lay open and patent before the eyes of appellee, a matter in which he certainly must have been vitally interested, and can be reasonably held by that interest to have been driven to inquire. The instruction should have been given. The refusal was duly excepted to. (Transcript, page 170.)

We ask that the judgment be reversed.

Respectfully submitted,

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